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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1506. 142

COLEMAN F. MADDEN,

Petitioner,

against

QUEENS COUNTY JOCKEY CLUB, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

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SUBJECT INDEX

CASES CITED.

STATUTES AND MISCELLANEOUS AUTHORITIES CITED.

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POINT I.

The decision of the Court of Appeals is reversable only by certiorari, and not by writ of error.

The petitioner makes no claim of invalidity of any Statute of the State of New York. His attack is upon the decision of the Court of Appeals upon the ground that the Statutes of the State of New York create certain rights in the petitioner of which he has been deprived by the decision of the Courts of the State of New York.

Such a contention may be passed upon by the United States Supreme Court only under 28 U. S. C. A. Section 344, Subdivision (b) of the Judicial Code, wherein review is authorized "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution" etc.

POINT II.

The granting of a writ of certiorari is discretionary.

Philadelphia & Reading Coal Co. vs. *Gilbert,* 245 U. S. 162.

POINT III.

This case involves no question which should appeal to the discretion of the Court.

U. S. Fidelity & Guaranty Co. vs. *Oklahoma,* 250 U. S. 111;
Deming vs. *Carlisle Packing Co.,* 226 U. S. 102.

Petitioner complains that respondent's act in excluding him from the race track is discriminatory and arbitrary thereby denying him the equal protection of the laws (R. 25, 26). Admittedly there has been no discrimination within the provisions of Section 40 Civil Rights Law based on race, creed, color or national origin (R. 44).

There is no case of mistaken identity involved. Respondent intended to exclude "Coley" Madden, the petitioner, "a self styled patron of the races" (R. 56).

Under the circumstances, there is no Federal Constitutional question involved or to be reviewed herein since Section 1 of Amendment XIV of the United States Constitution in granting the equal protection of the laws does not abrogate respondent's common law right to exclude.

The common law right of exclusion at race tracks has been long recognized. The English Court of Exchequer in *Wood* v. *Leadbitter,* 13 Mees. & W. 838, held that a ticket to witness races is a mere revocable license and that no action lies for damages for the exclusion of the person who

purchased the ticket, despite the fact that he had not in any way misconducted himself.

The Supreme Court of New Jersey in *Shubert* v. *Nixon Amusement Co.* (1912), 83 At. Rep. 369, referred to *Wood* v. *Leadbitter, supra,* as a leading case on this subject.

The *Leadbitter* case was also cited with approval in *Meisner* v. *Detroit, Belle Isle & Windsor Ferry Co.,* 154 Mich. 545 where the defendant, the owner of a ferry and an island in the Detroit River, which it operated as an amusement park, refused to accept the plaintiff as a passenger who brought action for his exclusion. The Court said:

> "Counsel do not disagree as to the law of common carriers of passengers. Any one, no matter what his character is or has been, presenting himself for transportation to such carrier, is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself to justify his exclusion. This rule does not apply to the owners of theatres, circuses, race tracks, private parks and the like, unless there be some statute regulating their business, and providing the terms and conditions under which that company's business may be carried on. It appears to be settled by authorities that these private enterprises, under the control of private parties, and that they may license whomsoever they will to enter, and refuse admission to whomsoever they will. Their own interests prompt fair and just treatment to those whom they invite to their places of pleasure. The right given to enter such places is a mere license, and after the right to enter is granted, it may be revoked. So, also, the right to enter may be refused to any one. * * *
>
> "*Wood* vs. *Leadbitter, supra,* is very similar in its facts to this case. It is cited with approval in several of the above cited cases. Pleasure grounds

of this character are no necessities of life, any more than are theatres and race tracks; and, unless restrained by some provision of their charters, their owners can impose any terms of admission they choose."

See also:

Collister v. *Hayman*, 183 N. Y. 250 (1905);
Luxenberg v. *Keith & Proctor A. Co.*, 64 Misc. 69 (1909);
Peo. ex rel. Burnham v. *Flynn*, 189 N. Y. 180 (1907);
Woollcott v. *Shubert*, 217 N. Y. 212 (1916);
Aaron v. *Ward*, 203 N. Y. 351 (1911).

This Court in refusing a writ in *46th Street Theatre Corp. and ano.* v. *Christie*, (Case No. 87), 323 U. S. 710, upheld the constitutionality of Section 40-b Civil Rights Law which by its terms applies to designated places of amusement and the fact that the New York Legislature in enacting Section 40-b omitted race tracks from such designated places of amusements shows an intent to reserve to the Racing Associations their common law right to exclude

"*Inclusio unius est exclusio alterius*"

(A) The petitioner herein complains that the decision deprives him of the equal protection of the laws, because the respondent has excluded him from its race track and incidentally, has thereby prevented him from engaging in pari-mutuel betting.

He complains of no statute nor of any official action. His complaint is solely against the Queens County Jockey Club for refusing to recognize what the petitioner deems to be a constitutional right to bet at the race track.

Petitioner advances the argument that in operating the pari-mutuel system of betting the respondent is acting as an official or agent of the State (Brief, pp. 14, 15, 22, 23). If that was so, then the State as the principal would be obliged to furnish the facilities for such operation and be responsible for losses in *minus pools* and would otherwise be obligated as principal.

The fact of the matter is that the State shares neither in profits, as such nor in losses, if any. The interest of the State is in all respects *a tax* with all the characteristics of taxation (Section 7561, Unconsolidated Laws, Racing Law).

The constitutional provision excepts from the general prohibition against gambling "pari-mutuel betting on horse races as may be prescribed by the Legislature and from which the State shall derive a reasonable revenue for the support of government, * * *" (Art. I, Sect. 9, N. Y. Constitution).

This is not a general grant of a privilege but a limited one which may be exercised only within constitutional and statutory limits.

Neither the constitutional amendment (Art. I, Sect. 9, N. Y. Constitution) nor the enabling legislation (Pari-Mutuel Revenue Law, Section 7561 *et seq.*, Unconsolidated Laws, Racing Law) restricts the respondent in the exercise of its common law right to select its own patrons. In fact the clear inference of the Civil Rights Law (Sections 40 and 40-b) is that race tracks shall continue to exercise all of its common law rights of exclusion except by reason of race, creed, color or national origin.

In the *Application of Stewart*, 174 Misc. 902, affirmed 260 App. Div. 979, appeal denied, 261 App. Div. 851, the Court said at page 903 of 174 Misc:

> "*No right to pari-mutuel betting itself was created by the Constitution.* What was created is an

> exception to the general prohibition which had theretofore removed all gambling from the scope of legislative sanction or permission. With the prohibition removed against this type of gambling the field of legislative action upon the subject was opened. The Legislature was freed from its former restraint and it became competent for it to authorize if it deemed proper, and to regulate, pari-mutuel betting on horse races."

Petitioner does not question the constitutionality of the enabling legislation (Pari-Mutuel Revenue Law, Section 7561 *et seq.*, Unconsolidated Laws, Racing Law).

(B) The question of petitioner's right to enter the race track and bet by means of the pari-mutuel machines is purely a matter of state law and presents no federal question.

The laws in question will be found in the "Unconsolidated Laws" of the State of New York, under the title of "Racing"—Section 7501-7520; "Pari-Mutuel Revenue Act"—Sections 7561-7583 and under the "Civil Rights Law" of the State of New York—Sections 40 and 40-b.

Under Section 40, Civil Rights Law, an owner of a race course and other places enumerated therein, may not exclude a person because of race, creed, color or national origin. The constitutionality of this section was upheld as early as 1888 in *People* v. *King,* 110 N. Y. 418.

Under Section 40-b, no owner of places of public entertainment and amusement enumerated therein may refuse admittance to any person over 21 years of age who presents a ticket of admission or shall eject such a person except for the causes stated therein. The places of public entertainment and amusement do not include "race courses".

As was said by the Appellate Division (R. 42, 43, 44):

"Persons not engaged as common carriers or other occupations which subserve the convenience or necessity of the public are at liberty to select their patrons (People *ex rel.* Burnham *v.* Flynn, 189 N. Y. 180; Aaron *v.* Ward, 203 N. Y. 351; Woollcott v. Shubert, 217 N. Y. 212; Noble *v.* Higgins, 95 Misc. 328, 329), save in so far as inhibited by statute. (Civil Rights Law, art. 4, sec. 40, 40-b.) 'The difference between public callings and private business is a distinction in the law governing business relations which has always had and will always have most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business may always refuse to sell if they please.' (1 Wyman on Public Service Corporations, p. 2) * * *

"Although the nature of the business is such as to place it within a field affected by public interest to an extent that it is properly subject to legislative regulation (People *v.* Budd, 117 N. Y. 1, 7; Munn *v.* Illinois, 94 U. S. 113; see Western Turf Association *v.* Greenberg, 204 U. S. 359), *the Legislature has not seen fit to provide, as to race courses, that the public be admitted without discrimination.* Its failure so to do (see Civil Rights Law, sec. 40-b) is in significant contrast to the express inclusion of 'race courses' in the named places of public accommodation, resort or amusement from which persons may not be barred on account of race, creed, color or national origin. (Civil Rights Law, Sec. 40; Grannan *v.* Westchester Racing Assn., 153 N. Y. 449, 465; Collister *v.* Hayman, 183 N. Y. 250, 254, 255.) Plaintiff does not claim that he was barred for any of those reasons." (Italics ours.)

(C) These laws have been construed to recognize and continue the well settled common law right of the proprietor of a place of amusement to exclude any one whom it chooses, with or without any reason.

This right is one of long recognition by the Supreme Court of the United States as well as the Courts of the State of New York.

Marrone vs. *Washington Jockey Club,* 227 U. S. 633-636;

Corrigan vs. *Coney Island Jockey Club,* 2 Misc. (N. Y.) 512;

Grannan vs. *Westchester Racing Association,* 153 N. Y. 449;

Woollcott vs. *Schubert,* 217 N. Y. 212;

Christie vs. *46th St. Theatre Corp.,* 265 App. Div. 255, affirmed 292 N. Y. 520, petition for writ denied, 323 U. S. 710 (Case No. 87).

The extent to which Respondent's rights are restricted or enlarged by the Legislature of the State is a purely local question.

(D) The construction placed upon the laws of the state by the highest court of the state, is binding upon the Supreme Court.

Supreme Lodge vs. *Meyer,* 265 U. S. 30;

American Railway Express Co. vs. *F. S. Royster Guano Co.,* 273 U. S. 274;

First National Bank vs. *Ayres,* 160 U. S. 660;

King vs. *West Virginia,* 216 U. S. 92.

(E) Petitioner's common law rights have not been enlarged by the enactment of the provisions for pari-mutuel betting.

1. The question as to the effect of the Pari-Mutuel statute upon the rights of the petitioner has been decided

adversely to the petitioner by the Court of Appeals. This decision is binding upon this Court.

The statutes in question neither expressly permit or forbid discrimination against anyone, except for reasons of race, creed, color or national origin.

The law permitting Pari-Mutuel betting was passed pursuant to the New York State Constitution, which permits this type of betting at race tracks only and forbids all other forms of gambling. N. Y. Constitution Art. I, Sec. 9; as amended in November 1939.

2. Betting has generally been the subject of regulation and even suppression. The indulgence in this pastime is not a matter of fundamental or constitutional right entitling every citizen to enter upon any place or property in which such pastime is engaged.

Otis vs. *Parker,* 187 U. S. 606;
See generally under the title Theatres and Shows, 62 Corpus Juris p. 843, *et seq.* Gaming, 27 Corpus Juris p. 996 *et seq.*

3. The provisions of the Pari-Mutuel Law follow closely other statutes relating to sports and amusements of various kinds.

"Racing Law", Unconsol. Laws, Sect. 7501;
"Pari-Mutuel Law", Unconsol. Laws, Sect. 7561;
"Sports" (Boxing), Unconsol. Laws, Sect. 9101;
"Alcoholic Beverage Law", Consolidated Laws. Chap. 33.

4. The Racing Associations receive no "franchise" but merely a license which must be applied for and issued annually, and the conduct of Pari-Mutuel betting must like-

wise be licensed in the same way and for the same period, for simultaneous operation.

Racing Law, Sect. 7508, Unconsol. Laws;
Pari-Mutuel Law, Sect. 7563, Unconsol. Laws.

As a matter of fact the Court of Appeals held that respondent does not have a franchise (R. 58, 59) and as its decision is binding on this Court, it cannot be urged by the petitioner that he has been discriminated against on that ground.

There is no more of a monopoly in reference to Pari-Mutuel betting than there is in racing itself. In fact the two are inseparably connected by the very nature of their activities and the provisions of the Statutes (*supra*). Both are conducted by private corporations although subject to regulation because of their relationship to the public. Both are subject to taxation for the benefit of the State.

But since admission to the race track is still subject to the discretion of the owner, so Pari-Mutuel betting at the race track, being an incident to the sport of racing, and permitted only within the race track enclosure, must likewise be subject to the right of the track owner to exclude.

The conduct of racing itself is limited by the statute to such race tracks as may be licensed and under such conditions as may be prescribed by the statutes and the New York State Racing Commission. Yet concededly the track owners may exclude any person with or without cause provided such exclusion is not because of race, creed, color or national origin.

The right to gamble is no more sacred and fundamental than the right to attend the races or to go to the circus.

In passing it is well to note that the Pari-Mutuel Revenue Law, Sections 7561 *et seq.*, Unconsolidated Laws, does

not make any reference or provision for admission or exclusion of patrons. It was passed by the Legislature to provide the State with a reasonable revenue for the support of government. However, under Section 7507 of the Unconsolidatd Laws (Racing) the Legislature empowered the State Racing Commission to adopt Rules and Regulations in its supervision of race meetings. Pursuant thereto the New York State Racing Commission enacted Section 30 (b), Article VI, which requires respondent to exclude those who are "known or reputed to be" bookmakers. Said Rule reads as follows:

> "(b) No person who is known or reputed to be a bookmaker or a vagrant within the meaning of the statutes of the State of New York, or a fugitive from justice, or whose conduct at a race track in New York, or elsewhere, is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing, shall enter or remain upon the premises of any licensed Association conducting a racing meet under the jurisdiction of the Commission; and all such persons shall upon discovery or recognition be forthwith ejected."

The Courts of the State of New York are required to take judicial notice of these Rules and Regulations (Section 344a Civil Practice Act).

The obligations imposed upon the Racing Associations to police their race track enclosures make it imperative for them to retain full control over admission thereto.

POINT IV.

The decision of the Court of Appeals does not violate the Fourteenth Amendment of the Constitution of the United States.

The clause of the Fourteenth Amendment relied upon by petitioner is found in Section 1:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The petitioner contends that because the respondent is permitted to exercise the right to exclude petitioner from its race track and incidentally from the Pari-Mutuel machines operated in connection therewith, he is thereby deprived of the equal protection of the laws.

(A) This clause of the Constitution is aimed at discriminatory legislation, and not at private or personal discrimination.

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation".
>
> *McPherson* vs. *Blacker,* 146 U. S. 1-39.

The amendment does not apply to individual or corporate infringements of the rights guaranteed by it.

> *Snowden* vs. *Hughes,* 321 U. S. 1-7.
>
> "The protection * * * does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his State established by State law."

In cases of persistent and intentional discrimination *by public officials*, their action may be subject to the same infirmity as though taken by the legislature itself. But this rule relates to public officers who owe a duty of impartial administration to all the public. To constitute unjust discrimination, the action must be that of the State or its representative.

Snowden vs. *Hughes*, 321 U. S. 1, at page 16.

But discrimination by private individuals against persons of a particular race is not violative of the Constitution —though it may be prevented by legislation.

Corrigan v. *Buckley*, 299 Fed. 899-901; 271 U. S. 323.

In *U. S.* vs. *Cruikshank*, 92 U. S. 542, the Court said at page 554:

> "The fourteenth amendment prohibits a State from depriving any person of life, liberty or property without due process of law; *but this adds nothing to the rights of one citizen as against another.*" (Italics ours.)

U. S. vs. *Harris*, 106 U. S. 629-638.

And in *Duncan* vs. *Missouri*, 152 U. S. 377, at page 382:

> "* * * due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; * * * "

POINT V.

The contentions of petitioner are fallacious.

1. The petitioner claims that the statute allowing betting creates a special privilege and therefore must grant to all the equal protection of the laws.

Inasmuch as the statute is silent on the subject, it provides for no discrimination in favor of one person as against another and therefore applies equally to all.

Petitioner does not contend and has not met the burden of showing that the statute is arbitrary. It was held by this Court in *Whitney* v. *California*, 274 U. S. 357, at page 369:

> "It is settled by repeated decisions of this court that the equal protection clause does not take from a state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary; and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley *v.* National Carbonic Gas Co., 220 U. S. 62, 78, 55 L. ed. 370, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, and cases cited."

The petitioner has no less and no greater rights than any other person respecting the right to enter upon respondent's property.

Petitioner's rights are no different from those of any one else. *No one has the right to enter upon the race track except by permission of the owner.* The law is equally applicable to all persons. The right to exclude may be applied not only to the petitioner, but to any and all other prospective patrons of the race track. His rights are not

infringed—because he has no rights. The special privilege is granted to the race track owner and not to the public generally.

The statutory permission is to engage in a certain type of business under license—not to go upon the race track and engage in betting.

It has been held by this Court that a ticket of admission to a place of amusement is, and always has been, merely a license (*Marrone* v. *Washington Jockey Club,* 257 U. S. 633, 637). In the *Marrone* case this Court said at page 636:

> "But as no evidence of a conspiracy was introduced and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right in rem. 35 App. D. C. 82. Wood *v.* Leadbitter, 13 M. & W. 838. McCrea *v.* Marsh, 12 Gray, 211. Johnson *v.* Wilkinson, 139 Massachusetts, 3. Horney *v.* Nixon, 213 Pa. St. 20. Meisner *v.* Detroit, Belle Isle & Windsor Ferry Co., 154 Michigan, 545. W. W. V. Co. *v.* Black, 75 S. E. Rep. 82, 85. Shubert *v.* Nixon Amusement Co., 83 Atl. Rep. 369. Taylor *v.* Cohn, 47 Oregon, 538, 540. People *v.* Flynn, 114 App. Div. 578, 189 N. Y. 180."

Respondent being a private corporation, conducting a private business upon its own private premises, cannot be said to be exercising a public use. The Pari-Mutuel Revenue Law does not seek to impress upon race tracks a use in favor of the public generally. Only those who are permitted by respondent to enter its race track enclosure may use the facilities provided.

The legislature could not single out the petitioner by law and disqualify him from attending the races or engaging in any other amusement. But it is not obliged to compel the operators of amusement places—including Pari-Mutuel betting—to admit all persons without discrimination. There has been no such right in the public, and none is created by implication. Admission is a matter of favor not of right.

2. The cases relied upon by petitioner relate to actions by legislature or by government officials.

Yick Wo v. *Hopkins*, 118 U. S. 356, relates to the *power of the city government* to restrict the right to engage in business by purely arbitrary requirements, directed against a certain class of people.

Hayes v. *Missouri*, 120 U. S. 68, merely holds that *the law* must be applicable to all alike. In petitioner's case the law operates alike on all but does not deprive respondent of its common law rights.

The law could not authorize the respondent to exclude the petitioner *only*, or any other specified class of people *only*. But it may license the conduct of a business and leave the operator of that business free to debar any person at his pleasure unless the business be in the nature of a public utility operating under a franchise.

Even there it does not appear that the legislature could not authorize refusal of accommodation if not based upon class distinction.

At any rate gambling and betting being subject to statutory regulation, and racing likewise being subject to regulation, the State has power to issue licenses, which does not create in the licensees the status of governmental representatives.

3. Petitioner contends that the license to conduct Pari-Mutuel betting creates a new and different situation and requires admission to be granted to any and all.

The fallacy of this has been pointed out above. The concession that admission to the race track is optional destroys petitioner's contentions. The right to bet is no greater than the right to attend the races. Moreover, respondent does not operate the only race track and Pari-Mutuel betting machinery in the State. Hence there is no monopoly.

POINT VI.

Petitioner still confuses a license with a franchise.

Throughout his petition and brief in support thereof, petitioner uses the words license and franchise interchangeably. While in one breath, petitioner admits that respondent has a license (Brief, pp. 15 and 22), he then argues that "a pari-mutuel license is a franchise" (Brief, p. 25). The Court of Appeals disposed of this confusion when it said at page 59 R.:

> "Plaintiff's argument results from confusion between a 'license', imposed for the purpose of regulation or revenue, and a 'franchise'. A franchise is a special privilege, conferred by State on individual, which does not belong to the individual as a matter of common right. * * *
>
> "A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare."

In his complaint, petitioner alleges that the respondent is exercising a public franchise granted by the state to sub-

serve a public purpose. He then argues that the words "license" or "franchise' are synonymous. The importance which petitioner attaches to this erroneous assertion will be found in Point IV, page 25 of petitioner's brief.

The law is explicit that racing for stakes and operation of pari-mutuels may only be conducted under license issued for specified dates within each calendar year which is revocable for causes stated in the statute (Sections 7508, 7509, 7563 and 7577, Unconsolidated Laws, Racing Law).

The right of a private corporation to exist as a corporate entity is frequently called a franchise, but this is not the sense in which the Court at Special Term in its decision (R. 30), nor the petitioner has used the term franchise. Rather they both emphasize the special franchise, usually granted to public service corporations, which permits the limited exercise of governmental functions such as condemnation, use of public highways, etc.

> *Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212, 226;
> *Trustees of Southampton* v. *Jessup,* 162 N. Y. 122, 126.

A franchise is property with the attributes of property.

> *Eighth Ave. Coach Corp.* v. *City of N. Y.,* 286 N. Y. 84-86;
> *People* v. *O'Brien,* 111 N. Y. 1-39.

By every standard of judicial interpretation as well as by the explicit language of the statute, the respondent operates its racing and pari-mutuels under a license, issued annually. See:

> Opinion of Appellate Division, R. 42 *et seq.;*
> Opinion of Court of Appeals, R. 57 *et seq.*

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POINT VII.

etition for a writ of certiorari should be denied
upo decisions of the Appellate Division (R., 42-
44) the Court of Appeals of the State of New York
(R. 1).

Da uly 11th, 1947.

Respectfully submitted,

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